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COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND, April 30, 2001

COMMONWEALTH OF VIRGINIA, ex rel:

STATE CORPORATION COMMISSION

CASE NO. CLK000311

Ex Parte: In the matter concerning
revised State Corporation Commission
Rules of Practice and Procedure

FINAL ORDER PROMULGATING STATE CORPORATION
COMMISSION RULES OF PRACTICE AND PROCEDURE

In 1974, the State Corporation Commission ("Commission") issued its Rules of Practice and Procedure ("Rules"), now codified at 5 VAC 5-10-10 et seq. The Commission revised its Rules by Order dated June 12, 1986, in Case No. CLK860572.¹ Since 1974 and 1986, many changes have occurred in the industries and businesses subject to the regulatory authority of the Commission, including the introduction of competitive forces in the establishment of rates and provision of services formerly established by economic regulation, or the increased interest in reliance on these market forces.

By Order entered on July 18, 2000, the Commission issued a proposed, revised version of the Rules ("Proposed Rules") and invited interested parties to comment on and suggest modifications or supplements to, or request hearing on, the Proposed Rules. The Proposed Rules were published in the Virginia Register of Regulations and were made available in the Clerk of the Commission's office, as well as on the Commission's website. Interested parties were given

¹ Commonwealth of Virginia, At the relation of the State Corporation Commission, Ex Parte: In the Matter of revising the Rules of Practice and Procedure of the State Corporation Commission.

until September 22, 2000, to file comments, proposals, or requests with the Clerk of the Commission.

Nine parties submitted comments on September 22, 2000.² The parties submitting comments were AEP-VA ("AEP"), AT&T Communications of Virginia, Inc. ("AT&T"), Columbia Gas of Virginia, Inc. ("Columbia Gas"), Cox, Old Dominion Electric Cooperative and the Virginia, Maryland & Delaware Association of Electric Cooperatives ("Coops"), the Office of the Attorney General, Division of Consumer Counsel ("AG"), Verizon, Virginia Electric and Power Company ("Virginia Power"), and Washington Gas Light Company ("Washington Gas"). AEP was the only party to request a hearing to permit oral argument on the Rules, although the other parties submitted revisions and most expressed a desire to participate if a hearing were held.

On November 28, 2000, the Commission entered its Order Setting Matter for Hearing in this proceeding. The Commission determined that the issues to be decided were purely legal in nature. As a result, the Commission scheduled this matter for January 9, 2001, for the purpose of hearing legal argument on the Proposed Rules and comments thereto. The Commission further ordered the parties and Staff to meet and attempt to narrow the issues. Prior to the hearing, the parties and Staff met and greatly narrowed the issues in controversy. These collaborative efforts resulted in additional modifications to the Proposed Rules, which were considered by all parties and the Commission at the hearing.

The Commission convened a hearing on this matter on January 9, 2001. All parties who submitted comments, as well as Staff, appeared by counsel at the hearing. The transcript of the proceedings was filed on January 29, 2001.

NOW THE COMMISSION, upon consideration of the evidentiary record, arguments, and the applicable law, is of the opinion and finds that the Rules set out in Attachment A hereto

² Cox Virginia Telcom, Inc. ("Cox") submitted revised comments on September 29, 2000, which were identical to the comments Cox filed on September 22, 2000, except that one item was omitted from the September 29, 2000, filing. No party objected to Cox's revision, and the Commission has considered Cox's September 29, 2000, comments as part of its deliberations on the Rules.

should be adopted, effective June 1, 2001.³ The Commission has considered all of the comments, revisions, argument of the parties, and the law applicable to these Rules in making its determination in this matter. As the market and regulatory environment changes, it is the Commission's hope that these Rules will be flexible enough to embrace these developments, while continuing to retain the hallmarks of due process and fair dealing that have been a tradition at the Commission. The Commission commends the parties and Staff for narrowing the issues in dispute prior to the start of the hearing. This successful collaborative effort has greatly improved the Rules.

While it is not necessary for us to comment on each and every rule where we have made changes, several Rules that were the subject of some controversy or were substantially revised since the inception of this proceeding require discussion.

RULE 50⁴

At the hearing, it was noted that § 12.1-30.1 of the Code of Virginia specifically provides that the Commissioners are responsible for notifying the parties of a requested ex parte consultation by another party, as well as providing other parties the opportunity to participate.⁵ While no parties suggested that the existing rule⁶ was not working, the language of § 12.1-30.1 of the Code of Virginia is mandatory.⁷ The Commission is therefore altering Rule 50 to track nearly verbatim the last sentence of § 12.1-30.1 of the Code of Virginia.

³ The new Rules will not, however, negate the provisions of any order entered prior to the effective date of these Rules.

⁴ For convenience, each Rule discussed will be referred to in this short form. The full citation for the Rule is 5 VAC 5-20-50.

⁵ Tr. at 33-34.

⁶ Rule 4:13.

⁷ "The rules shall provide, among other provisions, that no commissioner shall consult with any party or any person acting on behalf of any party with respect to such proceeding without giving adequate notice and opportunity for all parties to participate."

RULE 60

One of the contested issues at the hearing was what restrictions on ex parte contact with the Commissioners and Hearing Examiners during pending formal proceedings should be applicable to the Commission Staff. All parties agree that the Staff is in a different position than the other participants. Most parties appeared satisfied with the present situation and several stated specifically that the present rule should continue.⁸ Two parties, AEP and the Coops, argued in their comments as well as at the hearing that the Staff should be treated as a party and be subject to the same restrictions and obligations as parties.⁹ AEP's and the Coops' written comments went even further in advocating that the Staff be treated as a party.

AEP urged that the ex parte contact prohibition apply in a limited way to the Staff. Specifically, AEP's proposed prohibition would not apply to the entire Staff, but only to the particular individuals who are involved in preparing and presenting testimony on a specific topic.¹⁰ AEP asserted that this bar would not apply to the directors of the different divisions, or to Staff counsel, but only to the individuals "most directly involved in disputed topics and disputed issues of fact and law before the Commission."¹¹

The Coops argued, as a first step, for the creation of a Chinese wall between the Staff member most directly involved in the proceeding and the Commissioners or Hearing Examiner. This prohibition would also apply to Staff counsel assigned to the case.¹²

AEP and the Coops did not cite any legal support for their position, but instead argued that, at least in some cases, there was an appearance of unfairness in the failure to prohibit Staff from communicating with the Commissioners regarding a pending proceeding.

The Commission certainly wishes to avoid the appearance of impropriety, but the practical and legal difficulties inherent in AEP's and the Coops' position are readily apparent.

⁸ See Tr. at 42 (Virginia Power); 42-43 (AG); 43-44 (Verizon); 45 (AT&T).

⁹ AEP and the Coops also argued that the Staff should be subject to the same discovery obligations as other parties.

¹⁰ Tr. at 47.

¹¹ Tr. at 48.

¹² Tr. at 52.

Putting aside the legal and statutory issues,¹³ two practical problems exist with AEP's and the Coops' proposed solutions to this issue. First, it is very difficult to draw a bright line between those who would be permitted to communicate with the Commissioners and those who would be prohibited. For example, there may be multiple individuals with varying degrees of knowledge of a particular case who could be affected by an ex parte bar. Would the Staff person be permitted to communicate with the Division Director, who is required to be knowledgeable of ongoing cases, or would the ex parte bar prohibit the Division Director from advising the Commissioners as to any information learned from the employee behind the Chinese wall? This leads to the second issue.

It appears that additional Staff would be required to support separate advisory and advocacy roles.¹⁴ In some cases, more than one member of the Staff is involved in preparing for and testifying in a given case. If these Staff members were prohibited from communicating with the Commissioners, the Commissioners would be without advice on complex technical matters unless additional advisory Staff resources were procured. These advisory Staff members would need to be as knowledgeable as the Staff members testifying in the proceeding and trying the case.

Furthermore, the record is devoid of any evidence, anecdotal or otherwise, to support the view that there are, in fact, improper ex parte Staff communications occurring which result in violations of due process or fair dealing. AEP expressly disavowed the existence of such

¹³ The General Assembly has recognized implicitly in § 12.1-30.1 of the Code of Virginia that the Staff and parties are not the same. Both the title of the statute, and more importantly, the text, of § 12.1-30.1 of the Code of Virginia refer to the parties "or" the Staff. Indeed, if the Staff was to be treated as the equivalent of a party, there would be no need to refer to "the staff" at all.

Another statute legally supporting the present structure is § 12.1-18 of the Code of Virginia. That section provides for the appointment by the Commission of the various assistants and "such other subordinates and employees. . . all of whom shall serve at the pleasure of the Commission." It is plain from this language that the Staff is an extension of, and accountable to, the Commission, which places the Staff in a fundamentally different position from other parties. Neither AEP nor the Coops has addressed how the Staff could be accountable and responsive to the Commission in accordance with this statutory mandate, and yet be isolated behind a Chinese wall and prohibited from communicating with the Commission regarding a pending proceeding. Such isolation by a portion of the Staff does not appear to be contemplated by the plain language of § 12.1-18 of the Code of Virginia.

¹⁴ See Tr. at 42-43, 57, and 67-70.

problems.¹⁵ For all of these reasons, the Commission will adopt Rule 60 without the changes suggested by AEP and the Coops. We note that Rule 60 does include ex parte limits on the Commission and Staff designed to protect due process and fair dealing. Specifically, Rule 60 provides that:

[N]o facts nor legal arguments likely to influence a pending formal proceeding and not of record in that proceeding shall be furnished ex parte to any commissioner or hearing examiner by any member of the commission staff.

RULE 80

In the final version of this rule, the Commission is eliminating from the Rule discussed at the hearing the sentence that read, "[t]he commission may, at its discretion, permit cross-examination of public witness testimony, and may limit public witness testimony if it appears that the testimonies of the witnesses will be substantially similar, or for other good cause." The Commission continues to believe that public witnesses may be cross-examined like any other witness. Furthermore, the Commission deems this sentence unnecessary to establish the proposition that the Commission has the inherent power to control proceedings in its own courtroom and maintain proper decorum therein.

¹⁵ See Tr. at 55. The Coops argued that "... we've run into more situations where we have the feeling that Staff is advocating a role rather than just the feeling of the public interest where issues are raised purely by Staff." Tr. at 72.

RULES 260 & 270

Two primary issues need to be addressed in these rules. First is the suggestion that Staff should be subject to the same discovery obligations as parties. The Commission will provide two new avenues for parties to obtain additional information concerning the Staff's position in certain cases, as well as the basis for the Staff's position.¹⁶ Rules 260 and 270 provide this newly established avenue of discovery for parties.

Pursuant to Rule 270, in actions pursuant to Rule 80 A, the Staff must compile and file with the Clerk of the Commission three copies of any workpapers that support the recommendations made in its testimony or report. These workpapers will be made available for public inspection and copying during regular business hours.

The Commission has made one addition to Rule 260 pertaining to the filing of workpapers by Staff, which is directed in Rule 270. The first paragraph of Rule 260 has been amended to permit parties to discover factual information that supports the workpapers submitted by the Staff to the Clerk of the Commission pursuant to Rule 270. This was suggested by one of the parties,¹⁷ and would further enhance the new obligation on the Staff in Rule 270.

The second issue in Rule 260 involves the interplay of the last two paragraphs. While current Rule 6:4¹⁸ contains similar language to Rule 260 as discussed at the hearing, the parties were unable to reconcile the apparent conflict between the two paragraphs regarding the shifting of the burden on the inquiring party if the burden of deriving or ascertaining the response is substantially the same, and the apparent shielding of this same information as possible work product in the last paragraph. For this reason, the Commission has eliminated the last paragraph of Rule 260 as discussed at the hearing.¹⁹ The work product doctrine, like any other objection

¹⁶ In addition, Rule 280 A provides that, in investigative, disciplinary, penal, and other adjudicatory proceedings, upon written motion of the defendant, the Commission shall provide the defendant with access to certain statements of the defendant within the custody, possession, or control of Commission Staff.

¹⁷ See Comments of Verizon filed September 22, 2000, in Case No. CLK000311 at 9-10.

¹⁸ Rule 5 VAC 5-10-480.

¹⁹ "Interrogatories or document requests that solicit answers requiring the assembling or preparation of information that might reasonably be considered original work product are subject to objection."

not specifically mentioned in the Rules of Practice and Procedure, remains viable in Commission practice.

Accordingly, IT IS ORDERED THAT:

(1) The current Rules of Practice and Procedure, as set forth in 5 VAC 5-10-10 through 5 VAC 5-10-620 should be, and they are hereby, REPEALED, effective as of June 1, 2001;

(2) The new Rules of Practice and Procedure, as set forth in 5 VAC 5-20-10 through 5 VAC 5-20-280, attached to this order as Attachment A, should be, and they are hereby, ADOPTED, effective as of June 1, 2001;

(3) A copy of this Order and the Rules adopted herein shall be forwarded to the Virginia Register of Regulations for publication; and

(4) This case shall be dismissed from the Commission's docket of active proceedings, and the papers filed herein shall be placed in the Commission's file for ended causes.